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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ANDREW EDWARD ROBERTSON,

Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	1
I. A SENTENCING PROCESS THAT REQUIRES THE DEFENDANT TO PROVE MITIGATION SUFFICIENT TO OVERCOME AGGRAVATION BEFORE A LIFE SENTENCE CAN BE IMPOSED VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.	1

TABLE OF AUTHORITIES

Cases

Adamson v. Ricketts, 865 F.2d 1101 (9th Cir. en banc 1988), cert. pending, No. 88-1553	2
Adcox v. California, No. 88-7133	2
Bean v. California, No. 88-6881	2
Blystone v. Pennsylvania, No. 88-6222, certiorari granted, 109 S.Ct. 1567	2
Boyde v. California, No. 88-6613, certiorari granted, 109 S.Ct. 2447	2
California v. Brown, 479 U.S. 538 (1987)	1
Hitchcock v. Dugger, 481 U.S. 393 (1987)	1
Mills v. Maryland, 486 U.S. ___, 108 S.Ct. 1860 (1988)	2
Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934 (1989)	1
Sumner v. Shuman, 483 U.S. ___, 107 S.Ct. 2716 (1987)	1

Rules

United States Supreme Court Rule 22.5	1
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INTRODUCTION

Pursuant to United States Supreme Court Rule 22.5, Petitioner Andrew Edward Robertson submits this Reply to Brief in Opposition to Petition for Writ of Certiorari.

ARGUMENT

- I. A SENTENCING PROCESS THAT REQUIRES THE DEFENDANT TO PROVE MITIGATION SUFFICIENT TO OVERCOME AGGRAVATION BEFORE A LIFE SENTENCE CAN BE IMPOSED VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Argument III of the Petition for Writ of Certiorari,¹ Petitioner challenged the sentencing process at trial during which the trial court erred in allocating the burden of proof and saddling petitioner with a presumption of death.

In response, Respondent's Opposition proposes that California's 1977 death penalty statute meets Eighth Amendment standards and that there is no constitutional requirement that a burden of proof be allocated at penalty phase. Opposition, pp. 20-21. This position seems to be derived from the Respondent's general hypothesis that constitutional requirements are fulfilled simply by a capital sentencing process that narrows the class of death-eligible persons, then provides for some individualization at the penalty determination. *Id.*

Such a minimalist position is unsupportable. The requirement of an individualized death sentence mandates that the sentencer make a "reasoned moral response to [the defendant's] background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); see *Sumner v. Shuman*, 483 U.S. ___, 107 S.Ct. 2716, 2719-2721 (1987). The sentencing process must provide clear guidance to guarantee that the sentencer consider and give full effect to mitigating evidence. *Penry v. Lynaugh*, ___ U.S. ___, 109 S. Ct. 2934, 2947 (1989); *Hitchcock v. Dugger*, 481 U.S. 393, 398-399 (1987). Thus, a sentencing process that directs a sentencer to impose death

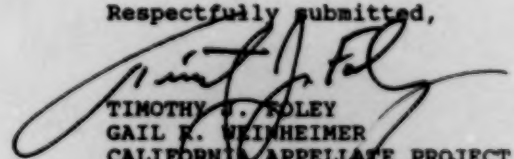
¹ The Petition for Writ of Certiorari will be referred to as "Petition"; Respondent's Opposition to Petition for Writ of Certiorari will be referred to as "Opposition."

simply because of a determination that aggravating factors are quantitatively weightier than mitigating factors, when the mitigation presented might otherwise lead the sentencer to conclude that life is the appropriate punishment, does not pass constitutional muster. Mills v. Maryland, 486 U.S. ___, 108 S.Ct. 1860, 1865-1866 (1988); Adamson v. Ricketts, 865 F.2d 1101, 1041-1044 (9th Cir. en banc 1988), cert. pending, No. 88-1553.

The Court is presently considering two cases that may help clarify the constitutional parameters of the weighing of aggravating and mitigating factors in capital sentencing. Blystone v. Pennsylvania, No. 88-6222, certiorari granted, 109 S.Ct. 1567; Boyde v. California, No. 88-6613, certiorari granted, 109 S.Ct. 2447. In addition, petitions for writ of certiorari are pending in Ricketts v. Adamson, No. 88-1553, Bean v. California, No. 88-6881, and Adcox v. California, No. 88-7133, that involve similar issues. Petitioner suggests that, in the event certiorari is not granted outright, the Court hold this matter until the resolution of these cases and consider the Petition at that time.

DATED: August 16, 1989

Respectfully submitted,


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No. 88-7619

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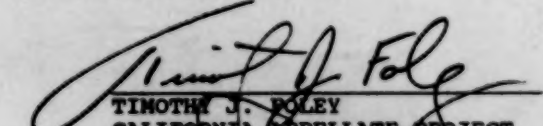
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FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, TIMOTHY J. FOLEY, a member of the Bar of this Court, hereby certify that on August 17, 1989, a copy of this Reply to Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California in the above-entitled case was mailed, first-class postage prepaid, to: Maxine Cutler, Deputy Attorney General, 110 W. A Street, Suite 700, San Diego, CA 92101, counsel for respondent herein. I further certify that all parties required to be served have been served.


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